Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAMS NATURAL GAS COMPANY,

Cross-Petitioner,

v.

AMOCO PRODUCTION COMPANY, ANADARKO PETROLEUM CORPORATION, MOBIL OIL CORPORATION, OXY USA, INC., AND UNION PACIFIC RESOURCES COMPANY,

Cross-Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

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May a Federal Court ignore clearly expressed Congressional intent merely because some of the parties agree to such a result?

LIST OF PARTIES AND RULE 29.6 LISTING

In addition to the parties identified in the caption of this Cross-Petition, the following entities were parties to the proceeding in the Court of Appeals:

Anadarko Petroleum Corporation
Cheyenne Light, Fuel and Power Company
Colorado Interstate Gas Co.
Federal Energy Regulatory Commission
K N Energy Inc.
K N Interstate Gas Transmission Co.
Missouri Public Service Commission
Mobil Oil Corporation
Oxy USA Inc.
Union Pacific Resources Company
Williams Natural Gas Company

Cross-Petitioner Williams Natural Gas Company is a wholly owned subsidiary of The Williams Companies, Inc. Other subsidiaries of The Williams Companies, Inc., that are not wholly owned by that corporation are as follows:

Altra Energy Technologies L.L.C.
American Soda, L.L.P.
Apco Argentina Inc.
Free Port Terminal Co. Limited
Kern River Gas Supply Corp.
Kern River Gas Transmission Co.
Kern River Service Corp.
Kiowa Gas Storage, L.L.C.

Nebraska Energy, L.L.C.
NES Supply Corp.
Northern Border Intermediate Limited Partnership
Northern Border Partners, L.P.
Parkco, L.L.C.
Pekin Energy Co.
Reserveco Inc.
TransNetwork Holding Co.
Tubexpress, Inc.
Williams Field Services-Gulf Coast Co., L.P.
Wiljet, L.L.C.

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No.

IN THE
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WILLIAMS NATURAL GAS COMPANY,

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v.

AMOCO PRODUCTION COMPANY, ANADARKO PETROLEUM CORPORATION, MOBIL OIL CORPORATION, OXY USA, INC., AND UNION PACIFIC RESOURCES COMPANY,

Cross-Respondents.

Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

Williams Natural Gas Company ("WNG") cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit (the "Court of Appeals") in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-30a)[1] is reported at Public Service Co. v. FERC, 91 F.3d 1478 (D.C. Cir. 1996). The Federal Energy Regulatory Commission's decisions (Pet. App. 35a-59a and Cr. Pet. App. 1a-4a) are reported at Colorado Interstate Gas Co., 65 FERC ¶ 61,292 (1993), and Williams Natural Gas Co., 66 FERC ¶ 61,198 (1994). The Commission's orders denying rehearing (Pet. App. 60a-83a and Cr. Pet. App. 5a-16a) are reported at Colorado Interstate Gas Co., 67 FERC ¶ 61,209 (1994), and Williams Natural Gas Co., 67 FERC ¶ 61,292 (1994).

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1996. Timely petitions for rehearing and rehearing *en banc* were denied on November 6, 1996. Pet. App. 31a-34a. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1) (1993).

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[1] With the exception of Williams Natural Gas Co., 66 FERC ¶ 61,198 (1994) (Cr. Pet. App. 1a-4a) and Williams Natural Gas Co., 67 FERC ¶ 61,292 (1994) (Cr. Pet. App. 5a-16a), the materials subject to Rule 14.1(i) were already reproduced in the appendix to the Cross-Respondents' petition in Docket No. 96-954. Consequently, pursuant to Supreme Court Rule 12.5, WNG does not reproduce those materials herein. For the Court's convenience, WNG incorporates by reference the appendix to Cross-Respondents' petition, in Docket No. 96-954. References to Pet. App. are to the Appendix field by Cross-Respondents in Docket No. 96-954. References to Cr. Pet. App. are to Appendix to Cross-Petition for Writ of Certiorari filed herewith.

RELEVANT STATUTES

Pursuant to Rules 12.5 and 14.1(f), WNG incorporates by reference the portions of the Natural Gas Policy Act of 1978 ("NGPA") reproduced in the appendix to Amoco's petition. (Pet. App. 103a-108a).

STATEMENT OF THE CASE

This case presents an important issue concerning a Court's authority and duty to identify and properly apply congressional intent. At issue in this case is the application of certain provisions of the NGPA. By express congressional command, the NGPA became effective on December 1, 1978. The NGPA established an entirely new regulatory regime. Under the NGPA, Congress established maximum lawful prices ("MLP") for gas purchased by interstate pipelines and outlawed the collection of any monies in excess of those maximum lawful prices. 15 U.S.C. § 3411 (1988). Congress did not give the Federal Energy Regulatory Commission ("FERC") the discretion to award refunds as it saw fit, but instead gave customers the unqualified right to obtain refunds for any price charged in excess of the maximum lawful price. 15 U.S.C. § 3413(e)(2)(B) (1988).

Section 110 of the NGPA permitted a gas producer to charge an amount in excess of specified price ceilings to the extent necessary to recover payment of state severance taxes attributable to the production of natural gas. 15 U.S.C. § 3320 (a)(1) (1988). From the NGPA's effective date of December 1, 1978, until January 1, 1993, when natural gas prices were deregulated, Cross-Respondents (collectively, the "Producers") charged pipelines and their customers (including WNG) the maximum lawful price established by Congress plus the

amount of Kansas *ad valorem* taxes paid by the Producers. The Producers viewed the Kansas *ad valorem* tax as a severance tax within the meaning of NGPA § 110.

In 1994, following a lengthy appellate process, FERC ruled that the Kansas tax did not qualify as a severance tax under § 110 of the NGPA, and, therefore, that the Producers' collection of the Kansas tax constituted an unlawful overcharge. (Pet. App. 35a-59a). Nevertheless, despite the clear language of the NGPA, which outlawed the collection of monies in excess of the statutory MLP and mandated refunds of any monies collected in excess of the MLP, FERC determined that it had the discretion not to order refunds for all unlawful collections. (Pet. App. 49a-53a, 75a). FERC reasoned that until 1988, the producers justifiably relied on a prior rule under the NGA (the NGPA 's predecessor), and that it was therefore fair to only award refunds back to that date. (Pet. App. 52a).

The parties sought review of FERC's ruling in the Court of Appeals. Public Service Company of Colorado ("PSCC"), and the Missouri Public Service Commission ("MoPSC") as intervenor, challenged FERC's authority to limit the retroactivity of the producers' liability for refunds of the Kansas tax. The Producers challenged FERC's decision that the Kansas tax constituted a property tax, rather than a severance tax collectable under NGPA. In addition, the Producers argued that FERC's decision constituted a change in the law that should be applied prospectively only. WNG defended the MoPSC's challenge to FERC's determination that pipelines should not be guarantors of refunds.

The Court of Appeals upheld the portion of FERC's decision determining that the Kansas tax was a property tax

collected in violation of the NGPA. The Court of Appeals also held that FERC did not have the discretion to limit the refunds to 1988, and therefore overturned FERC's ruling that the Producers were only required to refund taxes collected since June 1988. In its decision, the Court of Appeals recognized that, because the NGPA established maximum lawful prices and gave customers a right to a refund of all overcharges, FERC did not have the discretion to limit refunds. (Pet. App. 22a). The court correctly held that FERC's reliance on the NGA was misplaced because the NGPA constituted an entirely new regulatory regime. Despite a lengthy retroactivity analysis, the Court recognized that customers were entitled to a full refund of all Kansas *ad valorem* taxes collected after the effective date of the NGPA in 1978.[2]

Despite concluding that the NGPA required a refund of all the Kansas taxes recovered since the NGPA's enactment in 1978, the Court of Appeals held that it was constrained to only award refunds back to October 1983. (Pet. App. 24a, 29a). The court based its decision on a concession in PSCC's Petition for Rehearing before FERC that the date on which interested parties received notice should control the date of retroactivity. (Pet. App. 19a-20a).[3] The Court concluded that

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[2] The Court of Appeals stated that "anything short of full retroactivity (i.e., to 1978) allows the producers to keep some unlawful overcharges without any justification at all." (Pet. App. 24a). The Court further stated that "[t]here is no substantive reason . . . to deny customers all the relief to which they are entitled." (Pet. App. 28a-29a).

[3] The Court of Appeals acknowledged that PSCC argued for full retroactivity to 1978 before it and before FERC. (Pet. App. 19a). Furthermore, the Court of Appeals acknowledged that MoPSC argued for full retroactivity back to 1978, but held that MoPSC was precluded from raising that argument because it did not make a retroactivity argument in its

there was no controversy regarding retroactivity back to 1978 and that it was therefore constrained to only order refunds back to 1983 even though Congress clearly intended to require refunds back to 1978. (Pet. App. 28a-29a).

The Court of Appeals denied timely petitions for rehearing and suggestions for rehearing *en banc* filed both by FERC and by the Producers. Pet. App. 31a-33a. The Court also denied a petition for rehearing filed by PSCC, which asked the Court to reconsider its holding denying refunds back to 1978. Pet. App. 34a. WNG filed in support of PSCC's petition for rehearing. The Producers' Petition for Writ of Certiorari was docketed in this Court December 16, 1996 and the date for responses was extended to February 14, 1997.

REASONS FOR GRANTING THE CROSS-PETITION

Summary of Argument

The Court of Appeals refused to apply clear Congressional intent. The court acknowledged that the NGPA required a refund of all the Kansas taxes collected by the producers since the NGPA's enactment in 1978. Notwithstanding the clarity of the legislature's intent, the court allowed itself to be controlled by a perceived stipulation (by PSCC) as to a question of law, and consequently limited the customers' recovery to taxes paid since October 1983. (Pet. App. 24a, 28a-29a). This case thus presents an important question of federal separation of powers. The question has a

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request for rehearing before the Commission, and made its request before the Court of Appeals only as an intervenor and not as a petitioner. (Pet. App. 20a).

significant impact and broad application and the Court should therefore grant this Cross-Petition.

The Court of Appeals' decision directly conflicts with decisions of this Court and other United States Courts of Appeal regarding the judiciary's authority and duty to apply the law as enacted by the legislature. Moreover, this case presents extremely important issues because of the dangerous precedent the Court of Appeals' decision will set if allowed to stand. The Court of Appeals' decision stand, threatens the constitutionally mandated separation of powers by allowing the courts to invade the exclusive province of Congress.

I. THE COURT OF APPEALS WAS NOT LIMITED TO THE LEGAL THEORIES ADVANCED BY THE PARTIES BELOW.

The specific issue of how far back to award refunds under the NGPA was clearly before the court, yet the court held that it was powerless to award refunds back to 1978. Consequently, the decision below conflicts with decisions of this Court holding that "when an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., 508 U.S. 439, 446 (1993); Kamen v. Kemper Fin. Serv., Inc., 500 U.S. 90, 99 (1991).

The issue of whether a court retains the independent power to identify and apply the governing law is very important. By allowing the decision below to stand, this Court will be effectively acknowledging a limitation on a court's power to apply clearly expressed legislative intent. Such

precedent would have impact upon courts nationwide regarding the entire range of Congressional activity. This Court should give the lower courts guidance on applying the intent of Congress.

II. THE COURT OF APPEALS WAS CHARGED WITH THE DUTY TO APPLY THE LAW AS ENACTED BY CONGRESS.

In the decision below, the Court of Appeals blatantly failed to follow the governing law. Therefore, the decision below directly conflicts with one of the most basic rules of law. It is axiomatic that it is a court's duty to apply the law. See Kamen, 500 U.S. at 99; see also Maryland Dep't of Educ. v. Department of Veterans Affairs, 98 F.3d 165, 168 (4th Cir. 1996) ("courts are charged with the duty to apply the law that Congress enacted."); Phico Ins. Co. v. Providers Ins. Co., 888 F.2d 663, 665 (10th Cir. 1989) (it is the court's duty to apply the proper substantive law).

Obviously, it is important that the courts strictly adhere to their duty to apply the law as enacted by Congress. Any precedent to the contrary would most certainly have a tremendous impact on the courts and the public in general. This case is more troublesome than most. Here, the Court of Appeals openly acknowledged that it was allowing the Producers to keep "unlawful overcharges without any justification at all." (Pet. App. 24a). The decision below directly conflicts with decisions of this Court because it recognizes clear legislative intent, yet declines to put that intent into effect. The issue is an important one, which not only involves how a court applies the law, but also involves the fundamental integrity of our federal constitutional separation of powers. See generally O'Donoghue v. United States, 289

U.S. 516 (1932); Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995).

This Court has expressly recognized the extreme importance of issues involving the integrity of the separation of powers, and because of this importance, has heard these issues even when they were not raised in the court below.

> It is true that, as a general matter, a litigant must raise all issues and objections at trial. But the disruption to sound appellate process entailed by entertaining objections not raised below does not always overcome what Justice Harlan called "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers."

Freytag v. Commissioner of Internal Revenue, 501 U.S. 868, 879 (1991). Because the federal judiciary has a "strong interest" in constitutional separation of powers, the Court should grant this Cross-Petition to consider that important question.

III. THE COURT OF APPEALS' RESOLUTION OF QUESTIONS OF LAW SHOULD NOT HAVE BEEN IMPACTED BY STIPULATIONS OF THE PARTIES.

PSCC's "concession" regarding the date that should control the issue of retroactivity concerned a question of law. See Pet. App. 19a-20a. The question of retroactive application is a question of law for the court. See Retail Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir.

1972). The Court of Appeals allowed itself to be bound by what amounts to a party's stipulation to a question of law.

The decision below directly conflicts with decisions of this Court that hold a court is not controlled by an agreement of the parties on a question of law, and that such stipulations are invalid and ineffective. Case v. Los Angeles Lumber Prod. Co., 308 U.S. 106, 114 (1939); see Swift & Co. v. Hocking Valley R. R. Co. 243 U.S. 281, 289 (1917) (a stipulation does not foreclose legal questions); see also Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 152 (1942) (applying the same rule to legal conclusions arising from stipulated facts); Commissioner v. Ehrhart, 82 F.2d 338, 339 (5th Cir. 1936). The issue presented here is one of great public importance. Moreover, the decision of the Court of Appeals conflicts with the decisions of this and other federal courts holding that stipulations on questions of law are ineffective.

IV. THE COURT OF APPEALS HAD NO AUTHORITY TO DEPART FROM THE CONGRESSIONAL COMMAND SETTING THE EFFECTIVE DATE OF THE NGPA.

"When Congress enacts a new statute, it has the power to decide when the statute will become effective." Rivers v. Roadway Express, Inc., 511 U.S. 298, 313 n. 12 (1994). In the present case, the Court of Appeals completely ignored Congress' command setting the NGPA's effective date at December 1, 1978, and created its own effective date of October 1983. Consequently, the decision below directly conflicts with decisions of this Court holding that "in statutory cases the court has no authority to depart from the congressional command setting the effective date of a law that it has enacted." Id.; see also Collins v. Hardyman, 341 U.S.

651, 663 (1950) (holding "it is not for [the] Court to compete with Congress or attempt to replace it as the nation's law-making body"). No decision of this Court has provided an exception to that rule in a case where one party concedes such a result.

If allowed to stand, the Court of Appeals' decision would constitute direct authority giving courts the unbridled power to ignore Congress in direct conflict with this Court's prior decisions. Such a ruling could have a profound impact on the interpretation of virtually every act of Congress. The public importance of that result is obvious.

CONCLUSION

The decision below directly conflicts with numerous decisions of this Court and other courts regarding the judiciary's authority and duty to follow clearly expressed legislative intent. Furthermore, this case presents an important question of federal law related to the complimentary roles of the legislature and the judiciary. A decision that permits the courts to invade the province of Congress to legislate will have far-reaching impact on every area in which Congress acts. This Court should grant WNG's Cross-Petition to protect the federal judiciary's strong interest in maintaining constitutional separation of powers.

Respectfully submitted,

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January 31, 1997

APPENDICES

APPENDIX A

BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. TA89-1-43-000, -003, and RP89-39-001

WILLIAMS NATURAL GAS COMPANY

(Issued February 15, 1994)

LETTER ORDER

By Direction of the Commission: Lois D. Cashell, Secretary

Reference: (A) Revised Eleventh Revised Sheet No. 6 and Revised Tenth Revised Sheet No. 7 to FERC Gas Tariff, Original Volume No. 1; (B) May 30, 1989, Annual PGA supplemental information and July 29, 1989, revised magnetic tape filings.

The Commission accepts the tariff sheets listed in (A) above and the supplemental information filings listed in (B) above effective May 1, 1989. The filing is pursuant to the Commission order issued April 27, 1989, in Docket Nos. TA89-1-43-000 and RP88-39-001 (April 27 order). 47 FERC ¶ 61,114 (1989). The technical conference instituted in that

proceeding is terminated. Such acceptance is subject to Williams Natural Gas Company (WNG) refunding the Kansas ad valorem tax amounts to its customers in conformance with the Commission's orders in Docket Nos. GP83-11-002 and RI83-9-003. See 65 FERC ¶ 61,202 (1993), reh'g pending.

The April 27 order accepted and suspended WNG's annual PGA filing of March 1, 1989, in Docket No. TA89-1-43-000, to be effective May 1, 1989, subject to refund and subject to the outcome of the proceedings in related dockets. The filing was also made subject to the following conditions:

> (1) a technical conference being convened to permit parties to address their concerns with the filing;
>
> (2) WNG filing revised tariff sheets to reflect the removal of any costs necessitated by the Commission's action in Docket No. RP89-140-000;
>
> (3) WNG filing additional supporting information, within 30 days of the date of the order; and
>
> (4) WNG submitting a corrected magnetic tape version of its filing.

On May 30, 1989, WNG filed revised tariff sheets in Docket No. TA89-1-43-003, to reflect the removal of the jurisdictional portion of approximately $18.7 million of settlement pricing dispute payments. WNG had also filed for the recovery of these same settlement pricing dispute payments in its filing in Docket No. RP89-140-000. By order issued on

April 28, 1989, in Docket No. RP89-140-000, et al.,[1] the Commission directed WNG to remove, within 30 days of the date of the order, the settlement pricing dispute payments either from its Order No. 500 [FERC Stats. and Regs., Regs. Preambles 1986-1990 ¶ 30,761] filing in Docket No. RP89-140-000, or the instant annual PGA filing. WNG also included the supplemental information required by the April 27 order in its May 30 filing.

On July 21, 1989, WNG filed a new magnetic tape filing as required by the April 27 order.

Kansas Power and Light Company and Missouri Public Service Commission (referred to as Joint Commenters), filed position papers to the technical conference taking issue with certain aspects of WNG's PGA filing. Since WNG has restructured its system, effective October 1, 1993, pursuant to Order No. 636 [FERC Stats. and Regs. ¶ 30,939][2] and has terminated its PGA, the issues raised by Joint Commenters relating to (1) WNG's allocation of costs associated with storage losses, lost, unaccounted-for, and fuel gas, and net storage, transmission, and exchange transactions on its system, and (2) WNG's amortization of its Account No. 191 costs over a longer period of time than provided for in WNG's tariff and to customers other than provided for in WNG's tariff have been rendered moot. Any remedies such as Joint Commenters are seeking could only be implemented on a prospective basis and the PGA mechanism has been terminated.

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1 47 FERC ¶ 61,155 (1989).

2 65 FERC ¶ 61,221 (1993).

Notices of intervention and unopposed timely filed motions to intervene are granted pursuant to the operation of Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR § 385.214). Any opposed or untimely filed motion to intervene is governed by the provisions of Rule 214.

This acceptance for filing shall not be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended, nor shall it be construed as constituting approval of the referenced filing or of any rate, charge, classification, or any rule, regulation, or practice affecting such rate or service contained in your tariff; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company.

APPENDIX B

BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. TA89-1-43-004 and RP89-39-005

WILLIAMS NATURAL GAS COMPANY

(Issued June 2, 1994)

ORDER GRANTING IN PART AND DENYING IN PART REHEARING AND REJECTING MOTION FOR SUMMARY JUDGMENT AND PROVIDING NOTICE TO COLORADO AND WYOMING PRODUCERS OF FURTHER PROCEEDINGS

Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.

On March 17, 1994, the Missouri Public Service Commission (Missouri PSC) filed a request for rehearing of a Commission letter order issued February 15, 1994,[1] accepting

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[1] Williams Natural Gas Co., 66 FERC ¶ 61,198 (1994).

certain tariff sheets and supplemental information filed by Williams Natural Gas Company (Williams), and terminating a technical conference. For the reasons discussed below, the Commission grants in part and denies in part the request for rehearing. The Commission also rejects a motion for summary judgment of one of the issues raised in the rehearing, and issues a notice of further proceedings.

Background

On March 1, 1989, Williams submitted its proposed annual adjustment to its PGA clause in Docket No. TA89-1-43-000, to be effective May 1, 1989.[2] Reflected in the PGA, inter alia, was $18,087,099 in payments that Williams made to its producer-suppliers to reimburse them for their payments of ad valorem taxes to Kansas, Colorado, and Wyoming. The producers had charged these amounts to Williams as an add-on to the ceiling prices permitted by Section 110 of the Natural Gas Policy Act (NGPA).[3] Williams reflected these amounts in its PGA as net adjustments to its unrecovered gas costs. Several protesters claimed that the ad valorem tax reimbursements could be contract reformation

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[2] Williams also filed tariff sheets in Docket No. RP88-39-000 to eliminate its standby service rates.

[3] Section 110 of the NGPA permitted producers to charge as an add-on to the maximum lawful price "State severance taxes attributable to the production of such natural gas." 15 U.S.C. 3320(a). All NGPA price ceilings were eliminated as of January 1, 1993.

costs that should not be reflected in Williams' PGA. By order issued April 27, 1989, the Commission accepted and suspended the filing subject to a technical conference to address this and other issues, and subject to Commission "review of the additional information requested regarding ad valorem tax reimbursements and pricing dispute settlements."[4] The suspension order stated that these costs related to taxes assessed by the states of Kansas, Colorado, and Wyoming. On May 30, 1989, Williams filed revised tariff sheets to comply with the directives in the April 27, 1989 order.

The technical conference was held in 1989, but Staff held its report in abeyance while the issue of whether certain Kansas ad valorem taxes were severance taxes eligible for recovery under NGPA Section 110 was being decided in another case before the Commission. In 1988, in Colorado Interstate Gas Company (CIG)[5] the U.S. Court of Appeals for the D.C. Circuit had remanded to the Commission the issue of whether the Kansas ad valorem tax was a severance tax qualifying under NGPA Section 110 as an add-on to the maximum lawful price. On December 1, 1993, the Commission issued its order in the CIG case.[6] On remand, the Commission stated that, to determine if a tax was a "severance tax" for purposes of NGPA Section 110, there had to be a

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[4] Williams Natural Gas Co., 47 FERC ¶ 61,114 at 61,340 (1989); reh'g 48 FERC ¶ 61,017 (1989).

[5] Colorado Interstate Gas Co. v. FERC, 850 F.2d 769 (D.C. Cir. 1988).

[6] 65 FERC ¶ 61,292 (1993); reh'g denied 67 FERC ¶ 61,209 (1994).

systematic analysis of whether the tax is more like a severance tax on the production of gas as opposed to a personal property tax on the value of the gas remaining in the ground or on other production assets of the lease. The Commission found that the Kansas ad valorem taxes are not a tax on production and thus do not qualify as severance taxes recoverable under NGPA Section 110. Accordingly, the Commission ordered all Kansas producers that had unlawfully charged any interstate pipeline for such taxes after the June 28, 1988 date of issuance of the Court's decision in the CIG case, to repay the excess over the maximum lawful price to the pipelines, and for the pipelines to pass those refunded costs along to its customers.

Missouri PSC sought clarification of the Commission's statement in CIG that it would not require that pipelines be guarantors of refunds of the Kansas ad valorem taxes. Missouri PSC asked the Commission to clarify that it was not prejudging the merits of this issue in the instant Williams case. Missouri PSC argued that, because Williams' instant rates were protested and accepted subject to refund, Williams could have taken steps to protect itself, such as establishing an escrow account to ensure that it would be able to account for tax reimbursements. In the order on remand in CIG, the Commission found that this issue would be addressed in the instant proceeding, based upon the rulings in the CIG proceeding.[7]

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[7] 67 FERC ¶ 61,209, at fn. 46 (1994).

Following the CIG order, the Commission, by the February 15, 1994 letter order, accepted Williams' revised tariff sheets in this case. The Commission also accepted the supplemental information filed by Williams on May 30, 1989, subject to Williams refunding the Kansas ad valorem taxes reflected in its filing according to the methodology set out in CIG, and the Commission terminated the technical conference. The Commission held that all other issues addressed in the technical conference regarding Williams' PGA are now moot, since Williams no longer has a PGA mechanism after restructuring.

Rehearing

On March 17, 1994, the Missouri PSC filed for rehearing of the February 15, 1994 letter order. Missouri PSC argues that, while the issue of the Kansas ad valorem taxes may have been resolved by the Commission's decision in CIG, Williams' PGA also included payments made by Williams to producers to reimburse them for Colorado and Wyoming ad valorem taxes. Missouri PSC argues that the issue as to whether the Colorado and Wyoming taxes are severance taxes under NGPA Section 110 has never been addressed. Accordingly, Missouri PSC argues that the Commission should not have accepted the compliance tariff sheets or terminated the refund obligation in this proceeding until the Commission has determined whether Colorado and Wyoming ad valorem taxes were eligible for recovery under NGPA Section 110.

Missouri PSC also claims that the refund methodology in CIG should not be applied here because the circumstances

in the instant case differ from those in CIG. Missouri PSC contends that, in CIG, the Commission found that Kansas first sellers of gas that collected revenues in excess of the NGPA maximum lawful price as a result of the reimbursement of the Kansas taxes had to refund those amounts, with interest, to their customers, and that the pipeline was then to flow the refunds through to its customers through a lump-sum payment. Missouri PSC contends that the refund liability in CIG was contingent upon the pipelines' recovery of the subject costs from its suppliers. Missouri PSC claims that the subject tariff sheets in the instant proceeding were accepted subject to refund, and that such refund should not be contingent on Williams receiving any refunds of the costs from producers. Missouri PSC claims that it does not matter when Williams paid the related taxes to its suppliers. The issue, contends Missouri PSC, is that Williams included these taxes in its rates that are subject to refund. Accordingly, Missouri PSC argues that the Commission should order Williams to immediately refund amounts collected from its customers for the unlawful reimbursements of Kansas property taxes.

Motion

Missouri PSC also filed a motion for summary judgment in this proceeding on March 17, 1994, arguing that there is no material question of fact or law in this proceeding regarding the Kansas property taxes, and repeats the arguments made on rehearing regarding the need for immediate refunds by Williams of amounts it paid to reimburse producers for Kansas ad valorem taxes. Therefore, Missouri PSC moves that the Commission immediately order Williams to immediately

calculate the amount of Kansas property taxes recovered in its rates subject to refund, and to promptly refund those amounts.

On April 1, 1994, Williams filed an answer to Missouri PSC's motion, arguing that the motion is a collateral attack on CIG, and is an attempt to induce the Commission to amend the CIG order, or to misapply it to the instant proceeding. Williams contends that the CIG order was a broad industry-wide determination that established refund procedures applicable to all pipelines reflecting Kansas ad valorem taxes in their rates. Williams contends that the Commission's letter order in the instant proceeding confirmed that the CIG ruling is fully applicable to Williams, and that the ruling should be applied to all pipelines in a uniform, non-discriminatory manner. Williams states that the Commission determined in CIG that pipelines will not be required to be guarantors of refunds from producers, even in situations similar to the instant case. Williams contends that Missouri PSC is wrongfully attempting to overturn that determination. Williams also claims that this determination that pipelines should not be guarantors of refunds is consistent with the Commission's determinations in other producer refund situations where rates were accepted subject to refund.[8] Williams also argues that it would be unfair

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[8] Citing Refunds Resulting from Btu Measurement Adjustments, Order No. 399, FERC Stats. and Regs., Regs. Preambles 1982-1985, ¶ 30,597 at 31,154, reh'g Order No. 399-A, FERC Stats. and Regs., Regs. Preambles 1982-1985, ¶ 30,612 (1984), vacated in part on other grounds, Interstate Natural Gas Ass'n of America v. FERC, 756 F.2d 166 (D.C. Cir. 1985), cert. denied sub nom., Pennzoil Co. v. Associated Gas Distributors, 474 U.S. 847 (1985).

for the Commission to order it to pay refunds before it collects these payments from its producers.

Discussion

Further Proceedings

The Commission agrees with Missouri PSC that there are issues in the instant proceeding that had not been resolved when the Commission issued its February 15, 1994 letter order terminating the technical conference in this proceeding. First, the issue remains as to whether the Wyoming and Colorado ad valorem taxes paid by Williams to its producer-suppliers are production taxes that producers in these states could recover from their customers as an add-on under NGPA Section 110 to the otherwise applicable maximum lawful price. The issue must still be addressed by the Commission pursuant to the standards established by the Commission in its order on remand in CIG. If the severance taxes are so recoverable by the producers, then they were properly paid to the producers by Williams and did qualify as gas costs recoverable under Williams' PGA. If they were not so recoverable, then the producers could be required to refund these amounts and issues would arise as to Williams' right to recover the amounts in its PGA. Accordingly, the Commission grants in part rehearing, and reverses its decision to terminate this proceeding.[9]

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[9] Missouri PSC has not shown a reason why it was error to accept the tariff sheets in the February 15, 1994 order. As the Commission is not terminating the proceeding, the rates reflected in such tariff sheets remain subject to refund.

The Commission also finds that additional information and briefing is necessary in order to decide the remaining issues of whether the Wyoming and Colorado ad valorem taxes are severance taxes eligible to be recovered by first sellers under NGPA Section 110 as an add-on to the maximum lawful, first-sale, ceiling price. The Commission finds that fairness dictates that Williams and its Wyoming and Colorado producers be allowed to address the Commission's recent decision in CIG as it applies to the instant proceeding, and more specifically, as it applies to the Wyoming and Colorado ad valorem taxes. In CIG, the Commission established a test to use in determining whether a state tax qualifies as a severance tax that would be includable as a gas cost under the NGPA. The Commission directs Williams to submit to the Commission, within 20 days of the date of this order, a filing that sets forth: (1) the amounts of Wyoming and Colorado ad valorem taxes reflected in Williams' PGA filings beginning with the rates in the instant proceeding and ending on the December 31, 1992 expiration date of the NGPA ceiling rates; and (2) the text of the state laws or regulations pertaining to the taxes at issues. Producers that recovered the Wyoming and Colorado ad valorem taxes are invited to intervene in this proceeding within 40 days of the date of this order. In addition, within 40 days of the date of this order, Williams must (and any producer wishing to do so may) file an analysis of why the Wyoming and Colorado ad valorem taxes qualify for recovery under the CIG test, and thus were properly includable in Williams' PGA filing. Parties to this proceeding are invited to file answers to Williams' filing within 60 days of the date of this order.

Refunds

The Commission denies in part rehearing as it applies to Missouri PSC's request that partial refunds be immediately ordered for the full amount of the Kansas ad valorem taxes reflected in the filing. The Commission made a ruling in CIG as to how these taxes were to be refunded by the producers to the pipelines (including Williams) and then, in turn, by the pipelines to their customers. The finding in CIG as it applies to Williams, will not be overturned here.

The only difference that Missouri PSC points out between the CIG case and the instant case is that in the instant case the rates were accepted subject to refund. The Commission fails to see why that would dictate the outcome Missouri PSC requests. The acceptance of certain rates subject to refund does not determine the manner in which the Commission will order that those refunds be made. While Missouri PSC did protest the inclusion of ad valorem taxes in Williams' instant PGA filing, and the Commission did accept that filing subject to refund, that is not to say that if the Commission found that such taxes were not a production cost that the pipeline must deduct them entirely even before it had recovered these costs from its producers. Rather, the acceptance subject to refund meant that the Commission would order whatever refunds it found to be appropriate when it made a determination on the underlying issue. The Commission made that determination in CIG.

The Commission did state, in its order on remand in CIG, that refunds would be appropriate from the date producers "could have taken steps to protect themselves, such as establish

an escrow account for such tax reimbursement,"[10] but that reference was to the effective date of refunds and not to the issue of whether the pipeline must guarantee all refunds. Further, Williams merely included in its PGA filing the tax costs that it had paid to its producers. Hence, there would be no additional revenues for Williams to put into an escrow account. The producers, on the other hand were recovering unlawful tax costs, the proceeds of which could have been set aside for future refund obligations. Therefore, there is no reason why Williams should guarantee refunds when the Commission has found in CIG that other pipelines did not have that same obligation. Accordingly, the Commission finds that the instant case is not different from the CIG case in a manner that would require that the Commission to order refunds in a manner that is inconsistent with our decision in CIG. As the Commission has denied this request for rehearing regarding refunds, the Commission will reject the motion for summary judgment as moot.

The Commission orders:

(A) Notice is hereby provided to all producers in Colorado and Wyoming that a proceeding is being instituted in this docket to determine if the ad valorem taxes of those two states are recoverable as production costs. Producers that recovered the Wyoming and Colorado ad valorem taxes may file to intervene in this proceeding within 30 days of the date of this order.

(B) Rehearing is granted in part, in that the instant proceeding is not terminated.

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[10] 65 FERC at 62,373.

(C) Rehearing is denied in part, in that the Commission will not order further refunds in this case at this time.

(D) Missouri PSC's motion for summary judgment is rejected.

(E) Williams is directed to file, within 20 days of this order:

> (1) the dollar amounts of Wyoming and Colorado ad valorem taxes reflected in the subject filing and subsequent PGA filings through the December 31, 1992 expiration date of the NGPA ceiling prices; and
>
> (2) the text of the state laws or regulations pertaining to the Wyoming and Colorado ad valorem taxes at issues; and

(F) Williams is directed to file, within 40 days of this order, an analysis, under the CIG test, of why those taxes qualify for recovery in the instant PGA filing.

(G) Within 40 days of the date of this order, producers that recovered the Wyoming and Colorado ad valorem taxes are invited to intervene in this proceeding, and are also invited to file their analysis of why those taxes qualify for recovery in the instant PGA filing under the CIG test.

(H) Parties to this proceeding may file answers to Williams' filing within 60 days of the date of this order.

By the Commission.
(S E A L)

/s/ Lois D. Cashell

FILED
APR 7 1997
OFFICE OF THE CLERK

Nos. 96-954 and 96-1230

In the Supreme Court of the United States

OCTOBER TERM, 1996

AMOCO PRODUCTION COMPANY, ET AL., PETITIONERS

v.

PUBLIC SERVICE COMPANY OF COLORADO, ET AL.

WILLIAMS NATURAL GAS COMPANY, CROSS-PETITIONER

v.

AMOCO PRODUCTION COMPANY, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether gas producers who charged prices in excess of the maximum lawful wholesale rate formerly in effect for natural gas under the Natural Gas Policy Act of 1978, 15 U.S.C. 3301 *et seq.*, must make refunds that are retroactive either to 1983 or to 1978, the effective date of the Act.

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BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a)[1] is reported at 91 F. 3d 1478. The initial opinion of the Federal Energy Regulatory Commission (Pet. App. 35a-59a) is reported at 65 F.E.R.C. (CCH)

[1] References to "Pet. App." are to the appendix to the petition in No. 96-954.

¶ 61,292, and its opinion on rehearing (Pet. App. 60a-83a) is reported at 67 F.E.R.C. (CCH) ¶ 61,209.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1996. Petitions for rehearing were denied on November 6, 1996. Pet. App. 31a-34a. The petition for a writ of certiorari in No. 96-954 was filed on December 13, 1996. The cross-petition for a writ of certiorari in No. 96-1230 was filed on January 31, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns orders of the Federal Energy Regulatory Commission (Commission or FERC) requiring partial refunds of a Kansas *ad valorem* tax that natural gas producers had collected for more than a decade under an interpretation by FERC of Section 110 of the Natural Gas Policy Act of 1978, 15 U.S.C. 3320 (1988) (repealed), that was later reversed.

1. The Natural Gas Act (NGA), 15 U.S.C. 717 *et seq.*, authorized the Commission to establish "just and reasonable" rates for sales by the producers of natural gas. 15 U.S.C. 717d(a). In 1974, pursuant to that authority, FERC's predecessor, the Federal Power Commission (FPC), allowed producers to increase the otherwise applicable just and reasonable rate in order to recover "production, severance, or similar taxes."[2] Kansas imposed an *ad valorem* tax

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[2] Opinion No. 699, *Just and Reasonable National Rates for Sales of Natural Gas*, 51 F.P.C. 2212, 2301-2302, reh'g denied in relevant part, 52 F.P.C. 1604 (1974), aff'd *sub nom. Shell Oil Co.* v. *FPC*, 520 F.2d 1061 (5th Cir. 1975), cert. denied, 426 U.S. 941 (1976).

on producers that the FPC held qualified as a recoverable production tax.[3]

In 1978, Congress enacted the Natural Gas Policy Act (NGPA), 15 U.S.C. 3301 *et seq.*, which imposed certain statutory ceilings on natural gas rates. Section 110 of the NGPA allowed producers to recover charges in excess of the applicable statutory ceilings "to the extent necessary to recover * * * State severance taxes attributable to the production of" natural gas. 15 U.S.C. 3320(a)(1) (1988) (repealed) (Pet. App. 103a). Section 110 defined a severance tax for those purposes as "any severance, production, or similar tax, fee, or other levy imposed on the production of natural gas." 15 U.S.C. 3320(c) (1988) (repealed) (Pet. App. 104a); see *id.* at 10a.

In 1983, after passage of the NGPA, several parties filed petitions with the Commission taking the position that the FPC's 1974 order should be abandoned and that recovery of the Kansas *ad valorem* tax should be disallowed under Section 110 of the NGPA. The Commission denied those petitions in *Sun Exploration & Production Co.*, 36 F.E.R.C. (CCH) ¶ 61,093 (Sept. 23, 1986), reh'g denied *sub nom. Northern Natural Gas Co.*, 38 F.E.R.C. (CCH) ¶ 61,062 (Jan. 28, 1987) (*Sun Exploration*), and authorized producers to charge prices in excess of the statutory price ceilings in order to recover the costs of the Kansas *ad valorem* tax.

2. The court of appeals granted a petition for review and remanded, concluding that the Commission had not explained its decision "by reference to any cogent theory of what makes a tax 'similar' to a

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[3] Opinion No. 699-D, *Just and Reasonable National Rates for Sales of Natural Gas*, 52 F.P.C. 915 (1974).

production or severance tax under § 110." *Colorado Interstate Gas Co.* v. *FERC*, 850 F.2d 769, 773 (D.C. Cir. 1988) (*Colorado Interstate*). Although the court acknowledged that the Kansas tax relates to production, in that "past production is used to estimate the net present value of future production from a gas-producing property, and thus the property's taxable value," the court held that the Commission "failed to offer any principle for determining what relation to production is enough for a tax to qualify under § 110." *Id.* at 770.

3. FERC concluded on remand that the Kansas tax should be viewed as a property tax and not a severance tax eligible for recovery under Section 110. Pet. App. 43a-49a. As a remedy, FERC ordered refunds of only those taxes that had been included in the rates charged after June 28, 1988—the date of the court of appeals' decision in *Colorado Interstate*. In FERC's view, before that decision, producers reasonably relied on Commission orders holding that the Kansas tax could lawfully be recovered. After *Colorado Interstate*, however, producers were on notice that the Kansas tax might no longer be recoverable under Section 110. *Id.* at 51a-53a.

Several parties petitioned FERC for rehearing, arguing for either non-retroactive or more fully retroactive refunds. Cross-petitioner Williams Natural Gas Company (Williams) (No. 96-1230) did not, however, seek rehearing. No party ever requested that FERC order refunds dating from 1978. The only party that even adverted to the possibility of refunds dating from 1978 was respondent Public Service Company of Colorado (PSCC). PSCC observed that "it could well be argued that the date of retroactivity should be established as far back as December 1, 1978,

the date on which the NGPA became effective," but conceded that "fundamental fairness . . . [dictates] that the date on which interested parties were put on notice of the dispute should control the date of retroactivity." Request for Rehearing, *Colorado Interstate Gas Co.*, FERC Dkt. Nos. GP83-11-003 and RI83-9-004 (Jan. 3, 1994) (PSCC Rehearing Request) at 6; see Pet. App. 19a. PSCC thus argued that FERC "should have selected August 22, 1983" (the date of the petitions urging the Commission to reverse its policy in view of enactment of the NGPA), "or in the alternative October 4, 1983" (the date when notice of those petitions appeared in the Federal Register), as the "operative date" for refunds. PSCC Rehearing Request at 6. FERC denied rehearing. Pet. App. 60a-83a.

4. The court of appeals granted a petition for review by utilities and state public service commissions affected by the scope of the remedial order,[4] and held the producers liable to refund all of the Kansas taxes collected for the period since October 1983. Pet. App. 18a-24a. The court relied on the same legal test as had FERC (see *id.* at 50a-51a), invoking "[t]he governing principle" that "when there is a 'substitution of new law for old law that was reasonably clear,' the new rule may justifiably be given prospectively-only effect in order to 'protect the settled expectations of those who had relied on the preexisting rule,'" *id.* at 18a (quoting *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993)).

The court, however, rejected FERC's selection of the date from which refunds should run under that

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[4] Cross-petitioner Williams participated in the appeal as an intervenor, pursuing only an issue not relevant here.

test, reasoning that "enactment of a substantially new regulatory regime [upon passage of the NGPA] in 1978 undermined any assurance that the FPC's treatment of the Kansas tax under the NGA would withstand scrutiny under the NGPA." Pet. App. 24a. The court emphasized that "[h]ere the agency did not change the law—rather, the Congress did when it enacted the NGPA in 1978." *Id.* at 28a. In the court's view, "the status of the Kansas tax was expressly drawn into question in 1983" when parties first petitioned FERC for a ruling that producers could not lawfully recover the tax under the NGPA. *Id.* at 24a. "Because no seller of natural gas could justifiably be confident that it was entitled to recover the tax until the legal question was settled anew under the new statute," the court held, "the producers' liability for refunds extends back to October 1983, the date when all interested parties were given notice in the Federal Register that the recoverability of the Kansas tax under § 110 of the NGPA was at issue." *Ibid.*

The court did not require refunds for taxes collected from 1978 to 1983 because, it observed, "there is before us no controversy over those monies." Pet. App. 24a. Two litigants before the court of appeals, PSCC and the Missouri Public Service Commission (MPSC), raised the issue there for the first time, but the court rejected their claims. The court noted that PSCC had sought refunds only from 1983 before the Commission, that MPSC had not sought refunds and, in any event, as an intervenor on appeal, MPSC could "join issue only on a matter that has been brought before the court by another party." *Id.* at 20a n.* (quoting *Illinois Bell Tel. Co.* v. *FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990)). Accordingly, the court con-

cluded, PSCC and MPSC were "precluded from raising that argument" before the court. Pet. App. 20a n.*.

ARGUMENT

We agree with petitioners Amoco Production Company, et al. (Amoco) (96-954 Pet. 8-14) that the remedial judgments of administrative agencies, including FERC, must ordinarily be accorded great deference, and may be set aside only for abuse of discretion or lack of substantial basis. We do not, however, view the court of appeals' decision as generally derogating from that established principle. The remedial question in this case arose in the specific context of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3301 *et seq.*, which set statutory ceiling prices for natural gas, rather than affording FERC the discretion to do so, as under the NGA. Moreover, the operable provisions of the NGPA have since been repealed. Accordingly, review by his Court is not warranted.

1. Amoco contends (96-954 Pet. 9-11) that the decision of the court of appeals conflicts with cases recognizing the broad remedial discretion of administrative agencies, and affording deference to exercises of that discretion. The court below did not, however, purport to depart from those principles, or to call into question the District of Columbia Circuit's own decisions applying them. See, *e.g.*, *Exxel/Atmos, Inc.* v. *NLRB*, 28 F.3d 1243, 1246 (D.C. Cir. 1994) ("[W]e owe particular deference to the [agency's] choice of remedy."); *Laclede Gas Co.* v. *FERC*, 997 F.2d 936, 944 (D.C. Cir. 1993) ("FERC enjoys a great deal of flexibility in the remedy phase of an enforcement proceeding."); *Public Utils.*

Comm'n v. *FERC*, 988 F.2d 154, 163 (D.C. Cir. 1993) (citations omitted) ("[A]gency discretion is often at its zenith when the challenged action relates to the fashioning of remedies.") (internal quotation marks omitted); *Towns of Concord, Norwood, & Wellesley* v. *FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992) (court "refuse[s] to constrain agency discretion by imposing a presumption in favor of refunds").[5] Thus, this case presents, at most, a misapplication of that principle in the particular context of this case. "[T]he misapplication of a properly stated rule of law" is rarely a basis for certiorari. Sup. Ct. R. 10.

Petitioners argue (96-954 Pet. 11) that "[t]here is nothing about this case to suggest" that a deferential standard of review of FERC remedies is inapplicable here. Section 501(a) of the NGPA broadly authorizes the Commission to "perform any and all acts * * * as it may find necessary or appropriate to carry out its functions" under the Act. 15 U.S.C. 3411(a). We agree that NGPA remedial provisions should be construed to confer broad discretion on FERC. See, *e.g.*, *Mustang Energy Corp.* v. *FERC*, 859 F.2d 1447, 1462 (10th Cir. 1988), cert. denied, 490 U.S. 1019 (1989). But there is some basis for the proposition that FERC's remedial discretion was uniquely constrained in this case. Indeed, the court of appeals specifically noted PSCC's argument that, "whereas the [Natural Gas Act] gave the Commission discretion to order refunds if it determined that a rate was not just and reasonable, the NGPA established

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[5] Indeed, the court's opinion cites with approval *Williams Natural Gas Co.* v. *FERC*, 3 F.3d 1544 (D.C. Cir. 1993) (see Pet. App. 18a)—one of the decisions that FERC itself invoked to support its remedial order.

maximum lawful prices and gave the customer a right to a refund if it was overcharged." Pet. App. 22a. And, the court further noted, "[h]ere the agency did not change the law—rather, the Congress did when it enacted the NGPA in 1978." *Id.* at 28a. It might therefore be argued that once rates were determined to exceed the NGPA's *statutory* ceiling, FERC lacked the full measure of authority that it has in the context of "just and reasonable" *administrative* rate-setting under the NGA to limit relief.

The Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, § 2(b), 103 Stat. 158 (effective Jan. 1, 1993), repealed the statutory price ceilings at issue in this case. Given that the court of appeals' decision arose in the context of the NGPA's statutory price ceilings—a feature that is absent from the NGA—the repeal of the operative NGPA provisions furnishes an additional reason for this Court to deny review.

Amoco's contention (96-954 Pet. 17-18) that the court of appeals' decision will interfere with FERC's administration of its regulations by undermining the reliability of Commission policy in the eyes of the regulated community appears to be unfounded. If the decision below is limited to cases arising under the NGPA, it should present no threat to the public's confidence in FERC's continuing regulatory programs under other statutory provisions. If regulatory compliance problems do arise, they might warrant review in a future case.

2. The claim of cross-petitioner Williams Natural Gas Company (Williams) (96-1230 Pet. 6-11) that FERC should have ordered refunds dating from 1978 was not raised by Williams in the court of appeals and thus is waived. See *Ryder* v. *United States*, 115 S. Ct. 2031, 2036 n.4 (1995). In any event, review is barred by

Section 506(a) of the NGPA, 15 U.S.C. 3416(a). Section 506(a)(2) states that "[n]o person may bring an action under this section to obtain judicial review of any order of the Commission unless * * * such person shall have made application to the Commission for rehearing under this subsection." 15 U.S.C. 3416(a)(2). Section 506(a)(2) also requires that "[a]ny application for rehearing shall set forth the specific ground upon which such application is based." *Ibid.* Section 506(a)(4) specifies that "[n]o objection to such order of the Commission shall be considered by the court if such objection was not urged before the Commission in the application for rehearing." 15 U.S.C. 3416(a)(4).

Cross-petitioner Williams failed to satisfy the requirements of Section 506. Cross-petitioner did not seek rehearing before the Commission. Section 506 requires that the party seeking judicial review must have raised the issue before the agency, and cannot rely on the fact that another party filed a petition. See *Williams Natural Gas Co.* v. *FERC*, 943 F.2d 1320, 1328 (D.C. Cir. 1991); *Railroad Comm'n* v. *FERC*, 874 F.2d 1338, 1342 (10th Cir.), cert. denied, 493 U.S. 954 (1989); *Interstate Natural Gas Ass'n* v. *FERC*, 716 F.2d 1, 15 (D.C. Cir. 1983), cert. denied, 465 U.S. 1108 (1984). In any event, as noted above, see pages 4-5, *supra*, no other party raised on rehearing the full-retroactivity issue petitioner now seeks to raise.[6] The statutory rehearing requirements are

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[6] Only PSCC filed a rehearing request that mentioned relief dating from 1978, but PSCC actually sought relief dating only from 1983. Thus, even had PSCC filed a certiorari petition in this Court seeking refunds back to 1978, it would not have met the Section 506(a)(2) "specific ground" requirement.

jurisdictional, and failure to meet them bars judicial review. See *Interstate Natural Gas Ass'n*, 716 F.2d at 15; see also, *e.g.*, *Escondido Mutual Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 780 n.23 (1984) (citing parallel provision of Federal Power Act).

CONCLUSION

The petition and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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(4) (3)

NOS. 96–954 & 96-1230

IN THE

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Petitioners,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICI CURIAE* STATE OF KANSAS and KANSAS CORPORATION COMMISSION IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICI CURIAE* STATE OF KANSAS and KANSAS CORPORATION COMMISSION IN SUPPORT OF PETITIONERS

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Interstate Oil and Gas Compact Commission, *Produce or Plug: The Dilemma Over the Nation's Idle Oil & Gas Wells* (1997) 5

STATEMENT OF INTEREST OF *AMICI CURIAE*

Kansas ("Kansas") is a sovereign state. Its *ad valorem* tax gave rise to the proceedings[1] leading to this petition. Kansas' finances and industry are subject to disruption by the extreme retroactivity mandated by the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals" or "D.C. Circuit") decision at issue here. The Kansas Corporation Commission ("KCC") is the regulatory body charged with, among other duties, preventing the "production of natural gas ... in such manner ... as to constitute waste", and regulating "the taking of natural gas from any and all common sources of supply within this state in order to prevent the inequitable or unfair taking of natural gas from a common source of supply." Kan. Stat. Ann. § 55–701 & 703 (1996). Collectively, *amici* are referred to as "Kansas."

Kansas' interest in this case is twofold. On the first level, Kansas seeks reversal of a Court of Appeals decision which fails to take into account the practical realities of the Kansas gas industry and the impact its retroactivity order will have on this industry. It ignores the effect the decision will have on Kansas' ability to prevent waste of a finite natural resource and to finance its government in a rational way so as to properly serve its citizens.

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[1] *Public Service Co. of Colo.* v. *F.E.R.C.*, 91 F.3d 1478 (D.C. Cir. 1996). References to the opinion in this case are to the Petitioner's Appendix, "Pet. App. at _."

On the second level, Kansas is concerned with maintaining its proper role in the carefully crafted federal–state compromises, based on constitutional principles, set forth in the Natural Gas Policy Act of 1978 ("NGPA")[2], and approved in *Northwest Cent. Pipeline Corp.* v. *State Corp. Comm'n of Kansas*, 489 U.S. 493 (1989)(*"Northwest Pipeline"*), that underlie this case. This balance is improperly altered by the standard of review used by the D.C. Circuit in reaching its decision. In view of these interests, Kansas is in a unique position to advise the Court as to the governance and constitutional issues raised by the D.C. Circuit's decision.

This brief is filed with the consent of the parties. Copies of the consent letters have been field with the Clerk.

STATEMENT OF THE CASE

This case arises from a 1996 decision[3] of the D.C. Circuit ordering refunds in a Federal Energy Regulatory Commission ("FERC") case[4] retroactive to 1983 rather than 1988. Kansas disagrees with the underlying decision overturning settled agency jurisprudence concerning the status of Kansas' *ad valorem* tax under Section 110 of the NGPA, but understands that issue is not before this Court.

The standard applied by the Court of Appeals to the underlying FERC decision presents an important issue of

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[2] 15 U.S.C. §§ 3301-3432 (1978).

[3] Note 1, *supra*.

[4] *Colorado Interstate Gas Co.*, 69 FERC ¶ 61,292 (1993).

administrative law which, to Kansas, has serious federalism implications. Petitioner frames the issue in terms of the standard of review to be applied in reviewing agency decisions under broad legislative grants of authority.[5] Cross–petitioner sees a case where a federal court has failed to carry out the directive of the legislative branch[6]. For the reasons set forth below, Kansas supports the Petition and opposes the Cross-Petition.

Kansas' position is that this case demonstrates the need for, and importance of, a uniform standard recognizing the preeminence of agency decisions based on statutorily granted remedial authority. The Court of Appeals' use of *de novo* review, instead of the accepted abuse of discretion standard, introduces a level of uncertainty and capriciousness into agency proceedings which directly and substantially impacts state governance. Kansas, as other sovereign states, must be able to rely upon final orders of the FERC in order to manage the state's natural resources and finances. As a matter of federalism, *de novo* review in these circumstances improperly intrudes on the balance between the states and the federal government captured in legislation such as the NGPA. These are issues at the core of the allocation of power in our federal system and, as applied, are critical to the day–to–day operations of the Republic.

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[5] Petition of Amoco Production Company., *et al.*, for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, at 2 (hereinafter "Pet. at _").

[6] Cross–Petition of the Williams Natural Gas Company at 6.

REASONS FOR GRANTING THE WRIT

I. The D.C. Circuit's Decision Will Have A Severe Adverse Impact on Kansas.

The adverse impact of the D.C. Circuit's decision on Kansas' industry, conservation and fiscal policy is illustrated by review of the court's retroactivity order. The additional five years of refunds ordered by the appellate court is approximately $430 million (absent interest) above an equal amount of refunds for the years 1988 through 1993. *See* State of Kansas, Department of Revenue, Statistical Report of Property Assessment and Taxation, Table VIa (March 1996). Repayment will come not just from imagined large corporations with presumed larger cash reserves, of which there are few, but rather from hundreds of small producers and land owners, including royalty owners and working interest owners, across the state.

Gas and/or oil is produced in 89 of Kansas' 105 counties. The natural gas reserves in Kansas are the basis of a major state industry, employing approximately 24,000 Kansans. In the context of the national gas industry, in 1995, Kansas ranked 6th among the natural gas producing states (excluding the outer continental shelf which belongs to the federal government), 7th in severance and production taxes collected, and 6th in natural gas revenues with just under $1 billion collected. Hart's Oil and Gas World, Supp., *The Oil & Gas Producing Industry in Your State*, 1996-97 (Ind. Pet. Ass'n Am.), 100-07.

Of the 18,000 gas wells in the state, however, about 3000 are "stripper," or low volume wells[7], with low profit margins. The economic viability of many of these wells is threatened by the D.C. Circuit decision. *See* Kansas Corporation Commission, Internal Report, 2 (June 16, 1996). Kansas is in the process of estimating the number of these and other wells that may be abandoned prematurely due to the increased cost of operation stemming from the 10 years of refunds ordered by the Court of Appeals.

Abandoned or "idle" wells pose economic and conservation dilemmas for Kansas. If left unplugged or improperly plugged, waste results. Yet when plugged, a well is no longer capable of production with the result that the underlying resource is not available for use. In either case, the resources, and the revenue derived from the production of the gas, are lost to Kansas. Interstate Oil and Gas Compact Commission, *Produce or Plug: The Dilemma Over the Nation's Idle Oil and Gas Wells (1997)*.

Current taxes, including *ad valorem*, severance and conservation, represent about 14% of the sale price at the wellhead. State of Kansas, Department of Revenue Annual Report, 48 (1996). The refunds ordered by the Court of Appeals will increase the economic burden on natural gas production substantially, the amount per year depending upon the speed with which the refunds are recaptured. Resulting

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[7] Stripper wells are defined in the NGPA to be wells producing less than 60 Mcf per day. 15 U.S.C. § 3318 (1978). "Mcf" means 1,000 cubic feet of natural gas measured at a pressure of 14.73 pounds per square inch and a temperature of 60 degrees F. 15 U.S.C. § 3301(29) (1978).

abandonment of low margin gas wells will decrease the supply of gas, reduce tax revenues to Kansas and its local jurisdictions, raise potentially serious waste and conservation issues, and, to some unknown extent, reduce the pool from which repayment of the taxes may be sought.

II. The D.C. Circuit's Decision Applies the Incorrect Standard.

The Court of Appeals opinion begins by citing this Court's decision in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984), and agreeing that the standard of review is one of deference "to the administering agency's interpretation if it is reasonable in light of the structure and purpose of the statute. *Id.* at 842–43." Pet. App. at 6a. This is, however, the last mention of *Chevron* or its standard requiring deference to an administering agency's determination. Instead, the Court of Appeals ignores the standard of *Chevron* and proceeds with a *de novo* review of the underlying FERC decision demonstrating the need for this Court to establish a uniform standard of review of an agency's exercise of remedial authority entrusted to it by Congress.

A. The Correct Standard of Review is Based on Deference.

Petitioner ably demonstrates[8] that the standard of review applied throughout the courts of appeal in cases such as this, involving review of matters which Congress has delegated to an administrative agency for decision, is based on

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[8] Pet. at 8–14.

deference to that agency's determination. Petitioner's citations show (at 10–11) that regardless of the exact words used by the courts of appeal to define the standard, each decision contains the one factor the D.C. Circuit ignores, namely the principle that Congress entrusted oversight of the particular statute at issue to the agency, not the courts, in the first instance. The result of the D.C. Circuit's oversight, or perhaps judicial overreaching, is a standard of review that fails to give proper deference to the agency's decision. Under the D.C. Circuit's framework for analysis, the importance of the regulatory process is so reduced that no one can possibly "reasonably rely" on an agency's decision, even when the time for appeal has expired. Pet. App. at 24a.

B. The Court of Appeal's Decision Illustrates the Pitfalls of De Novo Review of Agency Decisions.

This Court has consistently deferred to regulatory agency administrative interpretations

> whenever [a] decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.

United States v. *Shimer*, 367 U.S. 374, 382 (1961). Even a cursory review of the NGPA reveals that the statute, and this case, are situations where "a full understanding of the force of

the statutory policy ... has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." *Id.*

To reverse FERC's decision, the Court of Appeals had to engage in fact finding to support its legal conclusions. The underlying proceedings, however, did not lend themselves conveniently to facts supporting the D.C. Circuit's legal conclusions, so they are loosely inferred from FERC's opinion. For example, the D.C. Circuit places great weight on the fact that there was a lack of "detrimental reliance on the part of the producers,"[9] and concludes that

> [W]e are hard pressed to see how the producers would be harmed in any cognizable way even if they were required to disgorge every dollar they received in recovery of the tax (assuming any party were seeking such extensive relief).

Pet. App. at 23a.

Despite the Court of Appeals' rhetoric, there was "detrimental and substantial reliance" both on the Federal Power Commission's 1974 decision that Kansas' *ad valorem* tax qualified for recovery, and after enactment of the NGPA, on FERC's own reliance on the ante–NGPA Kansas *ad valorem* tax decision as a basis for other Section 110 recovery cases. *See Independent Oil & Gas Ass'n*, 7 FERC ¶ 61,094 at 61,143 (1979). In view of these agency rulings, settled at the time of

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[9] Pet. App. at 23a.

both the 1983 petition to FERC challenging recoverability of the Kansas tax and the Court of Appeals' 1988 remand decision,[10] the reliance considered so improper by the D.C. Circuit was also justified.

By stating that reliance on the FERC (and the early FPC) decisions was not reasonable, the Court of Appeals implies that Kansas purposefully turned a blind eye toward an issue having a potentially large impact not just on one of the major industries in its state, but also on the ability of Kansas and its political subdivisions to finance their operations through orderly tax revenues. Pet. App. at 24a. Kansas, however, will indeed be harmed by implementation of the Court of Appeals' decision. The disruption to this industry generating 24,000 jobs and almost $100 million per year in *ad valorem* tax revenue alone is a most serious matter. So is the fact that the impact of the retroactivity order will fall not just on large corporations, but also on many small landowners and rural counties without substantial alternative sources of revenue. In view of these fiscal, and related conservation and resource management concerns, Kansas is examining carefully how the additional $430 million, plus interest, will be assessed.

III. *De Novo* Review Violates Federalism Principles Contained in the NGPA.

As with most major pieces of legislation, the NGPA reflects the types of compromises among the states, and between the states and the federal government, made in Congress since the beginning of the Republic. *See Northwest*

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[10] *Colorado Interstate Gas Co. v. F.E.R.C.*, 850 F.2d 769 (D.C. Cir. 1988).

Pipeline, supra, 489 U.S. at 506–07 (discussing the Natural Gas Act). As a result of long negotiations, decisions were made concerning issues such as intrastate and interstate gas, reconciling the interests of producers, consumers, states with gas reserves and those without, factors to be included in the prices, and calculation of prices themselves.[11] Kansas, as a producer and consumer of natural gas, had varied interests in the bill.

The statute was entrusted to FERC to interpret and administer, taking into account the language of the statute, the legislative history of the Act, data, views and arguments, *etc.*, and balancing the competing interests in an equitable way with knowledge of all aspects of the issues. 15 U.S.C. §§ 3411-3418 (1978). The NGPA as passed by Congress, with the indicated structure of agency interpretation and administration, adequately protects Kansas' interests.

The standard of review applied by the D. C. Circuit, however, removes FERC from its Congressionally–established role as primary administrator of the NGPA and inserts an Article III decision–maker into a political process. This process, part legislative, part judicial and part equitable, illustrates why independent commissions such as FERC were established. They reflect, and are intended to reflect, the policy (and party) divisions and competing interests that shaped the legislation they administer. *See Northwest Pipeline, supra,* 489 U.S. at 510–12. A standard of review which removes the initial decision from such bodies, and absent a compelling constitutional reason,

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[11] The Clerk of the House is reported to have said that the House–Senate Conference resulting in the NGPA was one of the longest in the history of the Congress.

places it in the hands of individuals whose constitutional makeup and mission are markedly different, impermissibly alters the compromises made by Congress in agreeing to the legislation.

The result of the D.C. Circuit's judicial intrusion, therefore, can be analyzed under separation of powers principles. To Kansas, however, the lens through which the D.C. Circuit viewed this case -- in contrast to the one used by the other circuits -- results in the judicial branch altering a carefully crafted balance struck in Congress among the states' representatives, the administration of which was entrusted to FERC. While the distinction may be subtle, it is vitally important to Kansas that its constitutional role not be reduced through judicial overreaching.

As a practical matter, replacing FERC with an Article III decisionmaker also virtually ensures that this Court's statement in *Northwest Pipeline, supra,* 489 U.S. at 510, cannot be carried out:

> It has long been recognized that absent pre–emptive federal legislation or regulation, States may govern the production of natural resources from a common pool, in order to curb waste and protect the correlative rights of owners.

The Court's thorough analysis of states' and federal government's respective rights under the Natural Gas Act and the Natural Gas Policy Act in *Northwest Pipeline* showed that "pre–emption analysis must be applied sensitively in this area, so as to prevent the diminution of the role Congress reserved to

the States while at the same time preserving the federal role." *Id.* at 515. The role "reserved to the States" includes the ability to take "measures ... in furtherance of legitimate conservation goals." *Id.* at 513.

A decision such as the D.C. Circuit's here, one not taking into account this role because an improper standard of review was applied, will result in federal action that prevents Kansas from being able to take otherwise appropriate state action to preserve this natural resource, resulting in waste and loss of production and property. As this Court said in *Northwest Pipeline, supra,* 489 U.S. at 512, quoting, *FPC* v. *Panhandle Eastern Pipeline Co.* 337 U.S. 498, 513–14 (1949), "we must be careful that we do not 'by an extravagant ... mode of interpretation push powers granted over transportation and rates so as to include production.'" The Court of Appeals has used just such an "extravagant ... mode of interpretation" with the predictable result.

Left as issued, the D.C. Circuit decision will have a chilling, and perhaps devastating, impact on the ability of Kansas to promote natural gas conservation and prevent waste of a valuable resource caused by the premature abandonment of natural gas reserves. This impact is particularly acute on the approximately 3,000 low production and margin stripper wells in Kansas. As the Interstate Oil and Gas Compact Commission noted in its 1996 report, *Marginal Oil and Gas: Fuel for Economic Growth*, stripper wells represent the ultimate in conservation because, once plugged and abandoned, access to the remaining gas is lost forever. However, abandonment or improper plugging of wells is a major source of waste. For this reason, Kansas, and most other oil and gas producing states,

encourages stripper well production and proper maintenance as a valuable means of conserving important natural resources.

IV. Conclusion.

The State of Kansas and the Kansas Corporation Commission respectfully request that the petition for a writ of certiorari be granted.

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BRIEF OF *AMICI CURIAE* THE INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA AND THE KANSAS INDEPENDENT OIL AND GAS ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a regulated entity is entitled to rely on a final agency decision unless and until that decision is overturned by the agency or a court of competent jurisdiction in a later case, or an act of Congress.

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STAFF OF HOUSE COMM. ON INTERSTATE & FOREIGN COMMERCE & STAFF OF SENATE COMM. ON ENERGY AND NATURAL RESOURCES, 95TH CONG., 2D SESS., NATURAL GAS PRICING AGREEMENT ADOPTED BY CONFERREES ON H.R. 5289 (Comm. Print 1978). 7

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BRIEF OF *AMICI CURIAE* THE INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA AND THE KANSAS INDEPENDENT OIL AND GAS ASSOCIATION IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Independent Petroleum Association of America ("IPAA") is a national trade association representing approximately 5,500 individuals and independent oil and natural gas producing companies involved in the exploration, development, and production of crude oil and natural gas in the United States. The membership of IPAA includes natural gas producers in Kansas. IPAA participates in legislative, federal regulatory and litigation matters on behalf of its members.

The Kansas Independent Oil and Gas Association ("KIOGA"), an organization of over 850 members, represents independent oil and gas producers and operators, supporting petroleum industry professionals and service and supply companies who serve the industry throughout Kansas. KIOGA is vitally concerned with matters which impact the oil and gas industry, which is a fundamental component in the economy of Kansas.

The decision by the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in the proceedings below will have a significant adverse impact on producers in Kansas. The practical economic impact of this decision will be felt by many IPAA and KIOGA members.

IPAA's and KIOGA's familiarity with the natural gas industry in the State of Kansas and with the adverse economic consequences that the decision of the D.C. Circuit will have on producers and production will benefit the Court in considering this case. IPAA and KIOGA therefore submit this brief of *amici curiae* in support of petitioners, Amoco Production Company, *et al.*

This brief is filed with the consent of the parties. Consent letters have been filed with the Clerk.

STATEMENT OF THE CASE

This case arises from a 1996 decision of the D.C. Circuit modifying a Federal Energy Regulatory Commission ("FERC" or "Commission") order imposing liability on gas producers for *ad valorem* taxes charged to customers. *Public Serv. Co. of Colo. v. FERC*, 91 F.3d 1478 (D.C. Cir. 1996). FERC initially ordered refunds retroactive to 1988. *Colo. Interstate Gas Co.*, 65 F.E.R.C. ¶ 61,292 (1993). The D.C. Circuit's decision increased the liability of producers by ordering refunds for natural gas production retroactive to October 1983. *Public Serv. Co. of Colo.*, 91 F.3d at 1490. While the Court affirmed the FERC holding that the Kansas *ad valorem* tax is not subject to recovery from purchasers under Section 110 of the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301 - 3432 (1978), the Court refused to defer to the carefully reasoned remedy adopted by the Commission.[1] The estimated impact of this decision on Kansas Gas Producers is almost one-half billion dollars.

The facts are set forth fully in the Petition and will not be repeated here, except to note that, the history of this case

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[1] The D.C. Circuit imposed liability for refunds beginning in October 1983 because that was "the date when all interested parties were given notice in the Federal Register that the recoverability of the Kansas tax under Section 110 of the NGPA was at issue...". *Public Serv. Co. of Colo.*, 91 F.3d at 1490. This reasoning clearly ignores the prior regulatory treatment of the Kansas *ad valorem* tax, upon which producers had relied since 1974.

extends back to 1974 when the Federal Power Commission ("FPC"), predecessor to the FERC, initially promulgated national maximum rates under the Natural Gas Act ("NGA"), 15 U.S.C. § 717 (1978), for producer sales.

In 1974, the FPC provided that, under the NGA, the maximum applicable rate "shall be adjusted upward for all State or Federal production, severance, or similar taxes." Opinion No. 699, 51 F.P.C. 2212, 2301 (1974). In that same year, at the request of the Corporation Commission of the State of Kansas ("KCC"), the FPC issued a subsequent opinion, clarifying Opinion No. 699, and providing further guidance allowing producers making jurisdictional sales in Kansas to adjust upward the national rate prescribed in Opinion No. 699 by the amount of the Kansas *ad valorem* tax. The FPC held that the Kansas *ad valorem* tax was a severance tax because "the bulk of the Kansas *ad valorem* tax is based upon production factors, and, as such, is in fact, a severance or production tax merely bearing the title '*ad valorem* tax.'" Opinion No. 699-D, 52 F.P.C. 915 (1974).[2] The FPC decision was a final ruling by a federal agency.

SUMMARY OF ARGUMENT

Natural gas production in Kansas is important not only to producers but to the economy of the state. Natural gas and/or oil is produced in 89 of the 105 counties in Kansas.

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[2] The FPC issued a supplemental order to Opinion No. 699-D articulating the proper procedure for collecting the Kansas *ad valorem* tax. *See* Order Supplementing Opinion No. 699-D, 52 F.P.C. 1326 (1974). This supplemental order further evidences the FPC's intent to treat the Kansas tax as an "upward adjustment" and, accordingly, recoverable as part of the national rate established in Opinion No. 699. *See id.*

Independent Petroleum Association of America, *Petroleum Independent*, Sept.-Oct. 1996, at 44. Much of the gas production comes from stripper wells, which are particularly vulnerable to the economic effects of the D.C. Circuit's decision. In 1995, the average number of employees engaged in the oil and gas business in Kansas was 24,002. *Id.* at 45. That does not include the land owners who receive royalty payments from the sale of oil and gas. The entire industry, including land owners, will be fiscally disadvantaged if the substantial additional refunds ordered retroactively by the D.C. Circuit are allowed to stand.

Producers and operators have historically relied on FERC for guidance and have followed, since Opinion No. 699 was issued in 1974, the specific rulings of the FPC and FERC as well as the legislative history of the NGPA allowing for recovery of severance taxes. When the Commission made the determination that the Kansas *ad valorem* tax would no longer be treated as a severance tax under Section 110 of the NGPA, the Commission set a reasonable retroactive date of recovery for it. Entities subject to regulation by federal agencies, as in this case, must be entitled to rely upon the validity of final agency determinations. *See* Administrative Procedure Act ("APA") 5 U.S.C. § 557(b) (1996). Kansas producers did so. It is patently unfair to permit, as the D.C. Circuit did in the case at bar, final agency orders, which are challenged many years later, to undercut all prior regulation. The 1974 FPC determination to allow recovery of the Kansas *ad valorem* tax as a severance tax under Section 110 of the NGPA remained in effect until overturned by FERC on remand from the D.C. Circuit in 1988. A decision that notice and refunds attach whenever a pleading is filed with an administrative agency means no one can ever rely upon final agency orders.

Additionally, to suggest, as Williams Natural Gas does in its Cross-Petition for Writ of Certiorari, that refunds should be retroactive to 1978 is untenable. To order refunds retroactive to 1978 would be a punitive measure imposed upon producers who were acting in accordance with a final FERC determination on how the Kansas *ad valorem* tax should be treated.

FERC understood that its order would severely impact natural gas producers, and sought to appropriately balance the liability for the *ad valorem* taxes between the producers and their customers. By contrast, the additional $500 million burden that the D.C. Circuit has imposed on producers fails to balance the equities involved. The practical impact of this burden will affect the entire industry and, if not reversed, could lead to the abandonment of certain wells, particularly stripper wells, resulting in loss of a precious natural resource. The D.C. Circuit's decision further demonstrates that decisions such as this are properly made by the agency charged with responsibility for overseeing the statute and regulating the industry -- the agency which understands the consequences to the industry and the economy when imposing retroactive liability.

ARGUMENT

I. The D.C. Circuit Decision Will Have a Significant Adverse Impact on Natural Gas Producers and the State of Kansas.

Natural gas production in Kansas is unique. There were 14,878 natural gas wells producing in 1995 in the state but over 19% (2,830) of the wells were stripper wells as defined by the NGPA. *See* 15 U.S.C. § 3301 (1978). Stripper wells are a

special category recognized by Congress in the NGPA as economically marginal wells which required separate legislative consideration in order to avoid premature abandonment and the loss of otherwise recoverable natural gas reserves.[3] According to data collected by the KCC, the 2,830 stripper wells produced a total of 36.6 Bcf of gas in 1995. Independent Petroleum Association of America, *Petroleum Independent*, Sept.-Oct. 1996, at 44. While these wells constituted significant production in total, the wells only produced an average of 35.4 Mcf per day. *Id.* The average price of gas in Kansas at the wellhead was only $1.37 per Mcf; the average stripper well generated a meager $48.50 per day in gross revenue. *Id.* at 45. That amount is reduced by royalty payments (generally 12.5%), county and state taxes (14%), and operating expenses.

Stripper wells accounted for more than $10 billion in U.S. economic activity and more than 28,000 jobs nationwide in 1995. Interstate Oil and Gas Compact Commission, *Marginal Oil and Gas: Fuel for Economic Growth* (1996). These wells are a vital source of domestic production, accounting for approximately 14 percent of U.S. oil production and 4.7 percent of U.S. gas production. *Id.*[4] While stripper wells may be considered marginal, they are not disposable. The

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[3] *See* H.R. CONF REP. No. 1752, 95th CONG., 2d SESS. 88 (1978); STAFF OF HOUSE COMM. ON INTERSTATE & FOREIGN COMMERCE & STAFF OF SENATE COMM. ON ENERGY & NATURAL RESOURCES, 95th CONG., 2d SESS., NATURAL GAS PRICING AGREEMENT ADOPTED BY CONFERREES ON H.R. 5289 (Comm. Print 1978).

[4] Stripper oil and gas well production generated $1.37 billion in employment earnings and $3120 million in severance taxes for the country last year. *Id.*

United States is the only country with significant production from stripper wells. The decision of the D.C. Circuit however, will encourage the premature abandonment of stripper wells, because production from such wells will no longer be economically viable. Once stripper wells are plugged it is not economically feasible to reopen them and their resource is gone forever.

Conservation and prevention of waste are legitimate issues of concern for producers in Kansas. An additional five year retroactive refund neglects these issues and fails to account for the realistic impact of such neglect on those producers, and, ultimately, the orderly use of a limited natural resource. This added liability will impose sufficient hardship on producers such that the production of natural gas will be a fiscal impossibility, forcing many producers to either shut down wells and/or declare bankruptcy, leaving significant amounts of natural gas untapped. This waste is precisely what the State of Kansas, and, ultimately the Commission, were trying to avoid by allowing the Kansas *ad valorem* tax to be recovered as a severance tax. Appropriately, the FERC decision crafted a remedy reflecting the competing considerations and burdens; the impact of a remedy must be carefully considered as the Commission did in exercising its extensive knowledge of the industry, the economics of the industry and regulatory history. The D.C. Circuit failed to take into consideration the need for conservation and protection against waste, both which could be impacted from premature abandonment of stripper wells.

Natural gas producers operate in more than one state. To the extent the additional refund obligation imposed by the

D.C. Circuit causes extreme financial hardship to a producer, the producer's drilling and production activities in all states will be jeopardized.

This case raises substantial economic impact concerns. Those concerns, while most acute in Kansas, extend beyond state borders. The magnitude of the impact warrants review of the D.C. Circuit decision by this Court.

II. Final Agency Decisions Must Not be Rendered Meaningless by Later Court Determinations.

In 1974, the FPC ruled that the Kansas *ad valorem* tax could properly be recovered by natural gas producers from their purchasers *in addition to* the purchase price. It was an appropriate add-on. The FPC order was not challenged. Neither were subsequent FPC and FERC orders which affirmed that determination. The clear regulatory policy was to allow recovery of the Kansas *ad valorem* tax by producers from gas purchasers.

In 1978, Congress codified the FPC's prior regulatory treatment of state tax costs. Under Section 110 of the NGPA, the price charged for the first sale of natural gas could exceed the otherwise applicable maximum lawful price to the extent necessary to recover any "State severance taxes attributable to the production of ... natural gas borne by the seller." 15 U.S.C. § 3320(c) (1988). FERC incorporated the FPC's pre-NGPA regulatory scheme, including the pre-NGPA ruling on the Kansas *ad valorem* tax, into its post-NGPA analysis. Subsequently, FERC followed the pre-NGPA Kansas tax decision in authorizing producers to recover costs of other state taxes under Section 110 of the NGPA.

FERC affirmed its earlier treatment of the Kansas *ad valorem* tax in 1979. *Independent Oil & Gas Assoc. of W. Va.*, 7 F.E.R.C. ¶ 61,094 (1979). The Commission held a similar West Virginia property tax (*ad valorem* tax) was a "production, severance, or similar tax" within the meaning of Opinion Nos. 699-H, 52 F.P.C. 1604 (1974), and 770-A, 56 F.P.C. 2698 (1976).[5] In 1982, the Commission reiterated its position that taxes related to production shall be treated as severance taxes when it held that a West Virginia service tax may be collected by the producer and such collection will not be considered to exceed the applicable maximum lawful price. *Trio Petroleum Corp.*, 18 F.E.R.C. ¶ 61,203 (1982). In reaching this position, FERC noted its conclusion was supported by language in the Joint Explanatory Statement of the Committee of Conference of the NGPA. The term "State severance tax" is intended to be construed broadly. *Id.* (*citing* H.R. REP. No. 1752, 95th Cong., 2d Sess. 91 (1978)).

Nine years after the initial agency decision permitting recovery of the *ad valorem* tax from gas purchasers, Northern Natural Gas Company ("NNGC") petitioned FERC to reconsider the FPC's 1974 Kansas tax ruling. FERC denied NNGC's request for rehearing on several grounds and affirmed

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[5] Commission Opinion Nos. 699-H and 770-A established the rate of general applicability under the NGA. These opinions include a tax adjustment provision which is codified in Section 2.56a(b) of the Commission's General Policy and Interpretation. *Independent Oil & Gas Assoc. of W. Va.*, 7 F.E.R.C. ¶ 61,094 (1979). The Commission also cited Opinion 699-D, 52 F.P.C. 915 (1974), for the proposition that "the Kansas *ad valorem* tax was based upon production factors and was therefore a proper upward adjustment to the national rate, and ordered that any state *ad valorem* tax which is based upon production factors will in the future be considered a 'similar tax.' The ruling there also applies to Opinion No. 770-A." *Id.*

its consistent historical treatment of the Kansas tax. *See Sun Exploration & Prod. Co.*, 36 F.E.R.C. ¶ 61,093 (1986), *reh'g denied sub nom. Northern Natural Gas Co.*, 38 F.E.R.C. ¶ 61,062 (1987). Upon review of that decision, the D.C. Circuit remanded the matter to FERC for further clarification of its position that the Kansas tax qualified as a severance tax under Section 110 of the NGPA. *See Colorado Interstate Gas Co. v. FERC*, 850 F.2d 769, 771 (D.C. Cir. 1988). Subsequently, in 1993, FERC reversed its prior decisions spanning the previous nineteen years, and held for the first time that the Kansas tax did not qualify as a severance tax under Section 110 of the NGPA.[6]

In reaching this conclusion the Commission was careful to review provisions for adopting a proper remedy. In exercising its discretion, the Commission employed the resources available to it as the agency charged with making national policy determinations of this nature. FERC, in balancing all competing interests including the federal court administrative retroactivity standards, concluded that refunds should be offered retroactive to 1988, the year the industry was first put on notice that taxes such as the Kansas *ad valorem* tax would no longer be treated as severance taxes under the NGPA Section 110.[7] Subsequently, on petition for review, the D.C.

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[6] Colorado Interstate Gas Co., 65 F.E.R.C. ¶ 61,292 (1993). Although this decision was challenged in the proceedings below, producers are not contesting the issue in this court. *See* Petition for Writ of Certiorari at 5 n.3. *Amici's* purpose in reviewing this issue is to contrast the years of reliance on FERC's treatment of the Kansas tax with the D.C. Circuit's arbitrary decision to order refunds retroactive to 1983.

[7] *Colorado Interstate Gas Co.*, 65 F.E.R.C. at 62,372 (stating "Upon review of the relevant court standards of administrative retroactivity we conclude that [the Commission's] ruling should be applied retroactively

Circuit arbitrarily imposed five more years of refund requirements beyond the refunds ordered by FERC, based on notice published in the Federal Register.[8] With interest, it is estimated that the total additional refund obligation approaches $500 million. The decision reflects an important lack of understanding on behalf of the D.C. Circuit as to the genuine impact of its decision, an impact that was understood and properly addressed by the Commission, and, more importantly, violates the APA 5 U.S.C. § 551-559 (1996) by failing to defer to agency discretion.

Congress recognized the need for regulatory certainty in the energy industry by permitting changes in rates resulting from complaint proceedings under Section 5 of the NGA, 15 U.S.C. § 717(d) (1996), *prospectively only from the date of a final Commission order or court order*. The interstate pipeline request to rescind recovery of the *ad valorem* tax was a complaint similar to an NGA Section 5 complaint. FERC denied the complaint in 1987. However, the D.C. Circuit ruled that the mere filing of the complaint triggered refund liability. The decision eliminates the fundamental concepts of fairness and regulatory certainty.

The very nature of regulation requires that parties subject to that regulation be allowed to rely on final decisions

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to the date of the court's decision in [*Colorado Interstate Gas*], June 28, 1988.")

[8] *See Public Service Co. of Colo.*, 91 F.3d at 1490. ("...we hold that the producers liability for refunds extends back to October 1983, the date when all interested parties were given notice in the Federal Register that the recoverability of the Kansas tax under § 100 of the NGPA was at issue...").

by the regulatory body which have not been appealed or which have been confirmed on appeal. The D.C. Circuit decision makes all such regulatory decisions meaningless if anyone later raises an issue in a regulatory proceeding, *even if the regulatory body affirms its prior decision*. The D.C. Circuit decision calls into question all final decisions by regulatory agencies. Reliance on agency decisions is fundamentally important to any industry subject to regulation. To allow the D.C. Circuit to arrogate this certainty through arbitrary decisions, such as this retroactive refund, undermines the purpose of federal regulation and, accordingly, warrants review.

CONCLUSION

For the reasons stated above, IPAA and KIOGA respectfully request the Court grant the Petition for Writ of Certiorari and review and reverse the decision below.

Respectfully submitted,

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No. 96-1230

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAMS NATURAL GAS COMPANY,
Cross-Petitioner,

v.

AMOCO PRODUCTION COMPANY, *et al.*,
Cross-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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II

QUESTION PRESENTED

Whether the court of appeals correctly refused, in accordance with the jurisdictional limitation imposed by Congress on reviewing courts in 15 U.S.C. § 3416(a)(4), to consider a refund claim that no party had presented in an application for rehearing before the Federal Energy Regulatory Commission.

STATEMENTS AS TO PARTIES TO THE PROCEEDING BELOW AND AS TO PARENT COMPANIES AND SUBSIDIARIES

These statements are contained in the principal petition for certiorari (No. 96-954) at pages ii-iv.

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IN THE

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OCTOBER TERM, 1996

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WILLIAMS NATURAL GAS COMPANY,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

Amoco Production Company, Anadarko Petroleum Corporation, Mobil Oil Corporation, OXY USA Inc., and Union Pacific Resources Company (collectively, the "producers") oppose the cross-petition for a writ of certiorari.

STATUTE INVOLVED

The Natural Gas Policy Act of 1978 ("NGPA") provides in relevant part: "No objection to [an] order of the [Federal Energy Regulatory] Commission shall be considered by the court if such objection was not urged before the Commission in the application for rehearing unless there was reasonable ground for the failure to do so." 15 U.S.C. § 3416(a)(4).

STATEMENT

1. As we explained in the principal petition for certiorari, this case arose when the Federal Energy Regulatory Commission, having overruled a series of its own prior orders, crafted a remedial order designed to accommodate the equitable interests of all affected parties. From 1974 until 1993, both FERC and its predecessor (the Federal Power Commission) had consistently ruled —initially under the FPC's producer price regulations and later under the Natural Gas Policy Act of 1978 (which had codified the applicable FPC regulation)—that natural gas producers could properly recover, in the prices they charged to first purchasers, the cost of a production-related Kansas *ad valorem* tax. *See* Pet. 3-5 (detailing the consistent series of pre- and post-NGPA agency decisions authorizing recovery of such taxes). In 1993, on remand from a prior D.C. Circuit decision, FERC overturned its prior rulings and held for the first time that producers could *not* lawfully include in their prices the cost of the Kansas tax. *See* Pet. App. 43a-49a.

The Commission then confronted the task of devising an appropriate remedy to implement its new decision—a task complicated by the fact that the producers had acted pursuant to the agency's own express authorization. Rejecting the extremes of "a fully retroactive" or "a fully prospective" remedy (Pet. App. 53a), FERC settled on a partially retroactive refund remedy that, in its expert judgment, best balanced the parties' competing interests.

As the Commission explained, until June 1988—when the D.C. Circuit remanded an earlier FERC ruling on the Kansas tax—no official body had ever cast doubt on the agency's prior treatment of the Kansas tax. Pet. App. 52a (discussing *Colorado Interstate Gas Co. v. FERC*, 850 F.2d 769 (D.C. Cir. 1988)). Before that date, natural gas producers could "justifiably expect to recover Kansas *ad valorem* taxes . . . with no expectation of a later refund obligation." *Id.* "After that date," by contrast, "the

parties no longer would have been justified in relying on the Commission's earlier rulings with any assurance that they would not later be required to make refunds of *ad valorem* taxes and could have taken steps to protect themselves, such as establishing an escrow fund for such tax reimbursements." *Id.* *See also* Pet. App. 78a-79a ("until [the 1988 decision] there was justifiable reliance on the prior rule"; "[i]t is only when the court acted, and questioned the rationale of the Commission's prior ruling, that reliance on that ruling would no longer be justified"). FERC accordingly ordered producers to refund the Kansas tax costs that they had collected from their customers after (but not before) the June 1988 D.C. Circuit ruling. Pet. App. 51a-53a.

2. Under the NGPA, a party may seek judicial review of a FERC order only if it has first presented its objections directly to FERC in a timely application for rehearing. 15 U.S.C. § 3416(a)(4). In accordance with that requirement, several parties sought rehearing of FERC's remedial determination. Cross-petitioner Williams Natural Gas, however, was not among them. Nor did any of the parties who did seek rehearing raise the issue that Williams presents in its cross-petition. No party asserted that FERC was required to order refunds back to the date of the NGPA's enactment in 1978. On the contrary, the parties who objected to FERC's limitation of refunds—Public Service Company of Colorado and Cheyenne Light, Fuel & Power—*expressly disavowed* any request for refunds back to 1978, because, they explained, any such claim would violate principles of "fundamental fairness." C.A. App. 252. Those parties instead objected to FERC's initial ruling *only* insofar as it did not order refunds back to 1983, when Northern Natural Gas Company first asked FERC to "reconsider" and "rescind" the prior orders expressly authorizing recovery of the Kansas tax. C.A. App. 247, 250, 253.

FERC ultimately denied all petitions for rehearing and reaffirmed its equitable judgment that producers should be

required to refund only those Kansas tax costs that they had collected after the D.C. Circuit's 1988 decision. Pet. App. 78a-81a.

3. Several parties—but, again, not Williams Natural Gas—petitioned the D.C. Circuit to review and set aside FERC's order limiting refunds to the period after 1988.[1] The court of appeals, applying *de novo* review, reversed the Commission's remedial determination. Engaging in its own remedial analysis, and according no deference to the agency's contrary assessment, the court ruled that natural gas producers had neither "detrimentally" nor "reasonably" relied on the earlier Commission orders expressly authorizing recovery of the Kansas tax. Pet. App. 23a-24a. *See also* Pet. 7, 14 (discussing the court's unique understanding of "detrimental reliance").

On the strength of these *de novo* determinations, the court of appeals believed that it would have been appropriate to order refunds back to 1978. Pet. App. 24a. The court refused to enter such an order, however, because no petitioner had preserved, in an application for rehearing before FERC, an argument for refunds for any period prior to 1983. Pet. App. 20a n.*, 24a, 29a.

ARGUMENT

The D.C. Circuit's refusal to order refunds back to 1978 is a plainly correct application of an unambiguous and well-understood jurisdictional limitation on the power of a reviewing federal court to consider objections to a FERC order. This aspect of the court's decision accords fully with the decisions of this Court and of other circuits. The cross-petition accordingly should be denied.

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[1] As Williams acknowledges (Cross-Pet. 4), it participated in the court of appeals proceedings solely as an intervenor in *support* of FERC on an unrelated issue not before this Court—whether pipelines were required to act as guarantors to *their* customers of any refund obligations actually imposed on producers.

1. The NGPA expressly prohibits a federal court from considering any objection to a FERC order that was not presented in an application for rehearing before the Commission, unless there was "reasonable ground" for the failure to do so. 15 U.S.C. § 3416(a)(4). Neither Williams nor any other party argued on rehearing before FERC that refunds should be awarded back to 1978, and Williams does not even attempt to argue that there was any "reasonable ground" for that failure. As we have noted, the parties that did seek rehearing made a conscious strategic decision not to ask FERC for such relief —indeed, they expressly acknowledged that ordering refunds back to 1978 would violate norms of "fundamental fairness." C.A. App. 252.

The D.C. Circuit's decision on this point was thus a routine, case-specific application of the jurisdictional rule of section 3416(a)(4). Adhering to Congress's express directive, the court simply refused to award relief on a claim that had not been properly presented to the agency. *See* Pet. App. 20a n.*. That decision comports with decisions of this Court applying the nearly identical jurisdictional provision of the Natural Gas Act, *see FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 36 n.21 (1968); *Panhandle Eastern Pipe Line Co. v. FPC*, 324 U.S. 635, 645 (1945), as well as similar provisions of other statutes, *see EEOC v. FLRA*, 476 U.S. 19, 23 (1986); *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 311 n.10 (1979). It is also wholly consistent with the decisions of other courts of appeals under both the NGPA and the Natural Gas Act. *See, e.g., Ecee, Inc. v. FERC*, 611 F.2d 554, 559-66 (5th Cir. 1980) (NGPA); *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1422 n.10 (10th Cir. 1992) (NGA); *Independent Petroleum Ass'n v. Economic Regulatory Admin.*, 870 F.2d 168, 174 (5th Cir. 1989) (NGA); *ARCO v. FPC*, 585 F.2d 943, 946 (9th Cir. 1978) (NGA).

2. Williams errs in asserting that the D.C. Circuit "refused to apply clear Congressional intent." Cross-Pet.

6. On the contrary, the court adhered scrupulously to the statute's express limitation on the scope of its reviewing authority. *See generally Finley v. United States*, 490 U.S. 545, 547 (1989) (" 'courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction' ") (quoting *Ex Parte Bollman*, 4 Cranch 75, 93 (1807) (Marshall, C.J.)). Nor is there any basis for the suggestion that the court considered itself "controlled by an agreement of the parties on a question of law." Cross-Pet. 10. Rather, the court correctly understood that its jurisdiction was confined by the plain terms of section 3416(a)(4)—a provision that Congress enacted to ensure that the expert agency itself would be given an opportunity on rehearing to address an objection to its order before that objection could be presented to a reviewing court.

Williams's assertions, moreover, rest on a manifestly mistaken premise. The D.C. Circuit nowhere "acknowledged that the NGPA required a refund of all the Kansas taxes collected by the producers since the NGPA's enactment in 1978." Cross-Pet. 6. Indeed, if the court had believed that the NGPA itself automatically required refunds, the court's entire remedial analysis would have been pointless. The court would have had no reason to consider whether the producers had "detrimentally relied" on the agency's prior rulings if it thought the statute itself required refunds.

In any case, it is wholly untenable to suppose that the NGPA necessarily requires fully retroactive refunds in a case like this and that Congress thereby deprived FERC of the remedial discretion traditionally accorded to expert regulatory agencies. On the contrary, as we explained in our petition for certiorari (at 11-12), FERC derives both its remedial *authority* and its remedial *discretion* from a single provision of the NGPA—which merely empowers the agency, in general terms, to "perform any and all acts . . . as it may find necessary or appropriate to carry out its functions." 15 U.S.C. § 3411(a).

Williams points to 15 U.S.C. § 3413(e)(2)(B)[2] as the supposed source of the NGPA's mandatory refund rule. Cross-Pet. 3. But that section has no application to this case. Section 3413(e) applies, by its plain terms, only to "interim collection[s]" for certain kinds of natural gas pending initial agency determination of whether the rates charged for the gas comport with certain specified statutory requirements. Section 3413(e)(2)(B) simply provides that, where producers make such interim collections "pending a determination under this section," those collections are subject to refund if the rate charged is later found to be too high. This case, however, involves no such interim rate, nor does it implicate any of the specific statutory requirements with which section 3413 is concerned. *See* 15 U.S.C. § 3413(a)(1) (listing specific kinds of determinations to which section 3413's provisions, including its rules on interim collections, apply). There is no basis, therefore, for Williams's suggestion that the NGPA "gave customers the unqualified right to obtain refunds for any price charged in excess of the maximum lawful price" (Cross-Pet. 3), much less for its suggestion that the D.C. Circuit accepted such a contention in this case.

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[2] This provision is reproduced at Pet. App. 107a.

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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